MID VALLEY CITY SDN BHD & ANOR

v.

AKITEK TENGGARA SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-384-1999]
2 SEPTEMBER 2002

CIVIL PROCEDURE: *Appeal - Jurisdiction of appellate court - Courts of Judicature Act 1964, s. 69 - Memorandum of appeal - Application to adduce fresh evidence - Amendments to memorandum of appeal - Application for - Courts of Judicature Act 1964, s. 69(3) & Rules of the Court of Appeal 1994, r. 7(3) - Whether requirements thereunder complied with - Whether applications to be granted*

Before this court, the appellant applied firstly to admit certain documents as evidence, which it conceded as amounting to fresh evidence, and secondly to amend its memorandum of appeal. The said documents involved a copy of the approved layout plan; a letter from Dewan Bandaraya Kuala Lumpur ('DBKL') regarding the grant of approval for development plans; a copy of the sales brochure; a copy of the notes of proceedings from trial at the High Court and the Supreme Court order; and the agreements between IJM Corp., IT & T Construction Sdn. Bhd. and itself.

Held:
Per Mokhtar Sidin JCA

[1] The power of this court to amend and admit further evidence is found in s. 69 of the Courts of Judicature Act 1964 and it is accepted that at the appeal stage, no fresh evidence should be allowed unless it was not available at the trial. Section 69(3) however provides that such evidence could only be produced on special grounds and with leave of the Court of Appeal. (pp 291 f & 292 a)

[2] The appellant's application to include the approvals by DBKL regarding the new lay-out plans and the new development plans was allowed as the requirements of s. 69(3) of the Courts of Judicature Act 1964 and r. 7(3) of the Rules of the Court of Appeal 1994 have been satisfied with. Furthermore, producing the layout plans without the development plans

were meaningless as both formed an integral part of the whole project. In coming to his conclusion, the trial judge had erred in perceiving that the said plans were non-existent and a concoction of the appellant. The approval of the new development plans was given after the parties had completed giving evidence in court. It would have been too late for the appellant to produce the new development plans as thereafter, the trial judge had requested the parties to file their submissions on quantum only. Producing the said documents, which would have been voluminous, would have had the effect of re-opening the whole trial. (p 295 a, c-e & g)

[3] The appellant would not be allowed to adduce the sales brochure as no evidence was led as to its relevancy, or that it was unavailable during trial. The said brochure represented the pictorial views of the layout and building plans which could be changed from time to time. It was found that the layout and building plans were sufficient for the purpose of the appeal to show whether the appellant had in fact used the respondent's plans or otherwise. (p 295 f)

[4] From the decision of the High Court, it was deduced that the respondent had re-opened the issue of the appellant's right to terminate the respondent's contract. Justice requires that the notes of proceedings in the High Court trial and the Supreme Court order *vide* Civil Appeal No. 02-124-1990 be adduced at the hearing of the appeal in deciding the validity of the termination of the contract. (p 297 d)

[5] The appellant would not be allowed to produce the agreements between IJM Corp., IT & T Construction Sdn. Bhd. and itself. Those documents were available during trial but no reasons was given as to its non-production. Additionally, the respondent was not a party to the contract and both IJM and IT & T were not parties to the original agreement. (pp 297 h-i, 298 a, h & 299 c)

[6] The proposed amendments to paras. 1, 2, 3 12 and 13 were allowed on the grounds that they would not take the respondent by surprise, that they would be consequential to the order of this court in allowing the fresh evidence adduced by the appellant and that it would be in the interest of justice to do so. (p 298 e)

[Application to adduce fresh evidence allowed in part; application to amend memorandum of appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Di hadapan mahkamah ini, perayu telah memohon pertamanya untuk memasukkan dokumen-dokumen tertentu sebagai keterangan, yang mana ianya menyetujui sebagai sama seperti keterangan baru, dan keduanya untuk meminda memorandum rayuannya. Dokumen-dokumen tersebut melibatkan sesalinan dari pelan susun atur yang telah diluluskan; sepucuk surat daripada Dewan Bandaraya Kuala Lumpur ('DBKL') berhubung pemberian kelulusan untuk pelan-pelan pembangunan; sesalinan risalah jualan; sesalinan nota-nota prosiding daripada perbicaraan di Mahkamah Tinggi dan perintah Mahkamah Agong; dan perjanjian-perjanjian antara IJM Corp., IT & T Construction Sdn. Bhd. dan dirinya sendiri.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Kuasa mahkamah ini untuk meminda dan memasukkan keterangan selanjutnya terdapat dalam s. 69 Akta Mahkamah Kehakiman 1964 dan ianya telah diterima bahawa di peringkat rayuan, keterangan baru tidak seharusnya dibenarkan melainkan ianya tidak tersedia di perbicaraan. Seksyen 69(3) walaubagaimana pun memperuntukkan bahawa keterangan yang sedemikian hanya boleh dikemukakan atas alasan-alasan khas dan dengan kebenaran Mahkamah Rayuan.

[2] Permohonan perayu untuk memasukkan kelulusan-kelulusan DBKL berhubung pelan-pelan susun atur yang baru dan pelan-pelan pembangunan baru telah telah dibenarkan kerana syarat-syarat s. 69(3) Akta Mahkamah Kehakiman 1964 dan k. 7(3) Kaedah-kaedah Mahkamah Rayuan 1994 telah pun dipenuhi. Lagi pun, mengemukakan pelan-pelan susun atur tanpa pelan-pelan pembangunan adalah tidak bermakna kerana kedua-duanya membentuk bahagian yang perlu bagi keseluruhan projek tersebut. Dalam mencapai kesimpulannya, hakim perbicaraan telah tersalah pertimbangan dalam melihat bahawa pelan-pelan tyersebut tidak wujud dan merupakan suatu rekaan perayu. Kelulusan pelan-pelan pembangunan telah diberi selepas pihak-pihak tersebut siap memberikan keterangan dalam mahkamah. Ianya terlalu lewat untuk perayu mengemukakan pelan-pelan pembangunan baru kerana selepas itu, hakim perbicaraan telah meminta pihak-pihak tersebut untuk memfailkan hujahan mereka atas kuantum sahaja. Mengemukakan dokumen-dokumen tersebut, yang mana adalah terlalu banyak, akan mempunyai kesan seperti membuka semula keseluruhan perbicaraan tersebut.

[3] Perayu tidak akan dibenarkan untuk mengemukakan risalah jualan kerana tiada keterangan dikemukakan berhubung dengan sifat relevannya, atau bahawa ianya tidak tersedia ada ketika perbicaraan. Risalah tersebut menunjukkan pandangan bergambar pelan-pelan susun atur dan bangunan tersebut yang mana boleh diubah dari semasa ke semasa. Adalah didapati bahawa pelan-pelan susun atur dan bangunan tersebut memadai bagi tujuan rayuan tersebut untuk menunjukkan sama ada rayuan tersebut telah pada hakikatnya menggunakan pelan-pelan responden atau sebaliknya.

[4] Daripada keputusan Mahkamah Tinggi, adalah dikemukakan bahawa responden telah membuka semula isu hak perayu untuk menamatkan kontrak responden. Keadilan menghendaki supaya nota-nota prosiding di dalam perbicaraan Mahkamah Tinggi dan perintah Mahkamah Agong melalui Rayuan Sivil No. 02-124-1990 dikemukakan di pembicaraan rayuan tersebut dalam memutuskan kesahan penamatan kontrak tersebut.

[5] Perayu tidak akan dibenarkan untuk mengemukakan perjanjian-perjanjian antara IJM Corp., IT & T Construction Sdn. Bhd. dan dirinya. Dokumen-dokumen itu tersedia ada ketika perbicaraan tetapi tiada alasan diberikan berhubung dengan tidak mengemukakan (non-production). Tambahan pula, responden bukannya satu pihak kepada kontrak tersebut dan kedua-duanya IJM dan IT & T bukannya pihak-pihak kepada perjanjian asal.

[6] Pindaan-pindaan yang dicadangkan kepada perenggan-perenggan 1, 2, 3 12 dan 13 telah dibenarkan atas alasan bahawa mereka tidak akan memeranjatkan responden, bahawa mereka akan bersampingan dengan perintah mahkamah ini dalam membenarkan keterangan baru dikemukakan oleh perayu dan bahawa ianya adalah demi kepentingan keadilan untuk melakukan sedemikian.

Permohonan untuk mengemukakan keterangan baru dibenarkan sebahagiannya. Permohonan untuk meminda memorandum rayuan dibenarkan.]

Kes-kes yang dirujuk:

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd & Anor [1999] 3 CLJ 383 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 69(1), (2), (3)
Rules of the Court of Appeal 1994, r. 7(3)

For the appellant - R Rajasingam (S Rutheran & KT Wong); M/s V Siva & Partners
For the respondent - Manjit Singh (Balvinder Singh); M/s Sri Ram & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2-22-545-91]

Reported by M Maheswaran

JUDGMENT

Mokhtar Sidin JCA:

On 12 May 2000, the applicant/appellant filed a notice of motion praying for the following orders:

(1) that the supplementary record of appeal containing the sealed order of the High Court of Malaya at Kuala Lumpur dated 11 May 1999 filed herein on 13 December 1999 be deemed to be part of the record of appeal filed on 30 June 1999.

(2) in the alternative, that the appellant be at liberty to file and serve a Supplementary Record of Appeal containing a copy of the sealed order of the High Court of Malaya at Kuala Lumpur dated 11 May 1999 within three weeks from the date of this order;

(3) Mid Valley City Sdn Bhd, the appellant abovenamed be at liberty to amend its memorandum of appeal dated 30 June 1999 in the manner shown in red, a copy of which is annexed together with this notice of motion;

(4) Mid Valley City Sdn Bhd, the appellant abovenamed be at liberty to adduce and read in evidence the following important documents and facts contained therein during the hearing of this appeal:

(a) a copy of the approved layout plan dated 17 June 1997;

(b) letter dated 8 December 1998 from Dewan Bandaraya Kuala Lumpur granting approval for development plans;

(c) a copy of a sales brochure containing a pictorial representation of the proposed development;

(d) a copy of the notes of proceedings taken before the High Court of Malaya at Kuala Lumpur in Originating Motion No. R8-25-46-1989;

(e) a copy of the order of the Supreme Court in Supreme Court Civil Appeal No. 02-124-1990 dated 13 November 1990;

(f) an agreement between the appellant and IJM Corporation Bhd (No. 104131-A) and IT & T Engineering and Construction Sdn Bhd (No. 86508-H) for the construction of the development together with attachment three (3) thereof.

At the commencement of the proceedings the learned counsel for the respondent made it clear that he has no objection to either prayer (1) or (2). It is clear to us that the supplementary record as stated in prayers (1) and (2) have not been filed yet and we made the order that prayer (2) be allowed and that the appellant is to file and serve the supplementary record of appeal within two weeks.

As to the other prayers the learned counsel for the respondent made it clear that he is objecting to those prayers. The affidavit in support of the application was affirmed by one Tan Boon Gark, the managing director of the appellant. In his affidavit, Mr. Tan Book Gark stated that the second appellant (IGB Corporation) is not an interested party in this proceedings because the respondent had in the High Court withdrawn the suit against IGB Corporation Bhd. According to the appellant the purpose of the application as found in prayers (3) and (4) are twofold, firstly to adduce fresh evidence and secondly to amend the memorandum of appeal. Together with this application the appellant also filed a copy of the proposed amended memorandum of appeal. (The Bahasa Malaysia version is at pp. 43 to 50 and the English version is found at pp. 51 to 58 of the present application). The documents stated in prayer (4) are exhibited in the application at pp. 60 to 90.

The proposed amendments to the memorandum of appeal depend on our decision in respect of prayer (4). For that reason we will deal with prayer (4) first. The power of this court to amend and admit further evidence is found in s. 69(1), (2) and (3) of the Courts of Judicature Act 1964:

69. Hearing of Appeals

(1) Appeals to the Court of Appeal shall be by way of rehearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

The present application is made pursuant to s. 69(3) of the Act and r. 7(3) of the Rules of the Court of Appeal 1994. The wordings found in r. 7(3) are almost identical to the wordings in s. 69(3) and as such there is no necessity for us to repeat them.

Application To Introduce Fresh Evidence

Several affidavits were filed by both parties and the appellant conceded that the documents which they seek to produce in prayer (4) tantamount to adducing fresh evidence. It is trite law that at the appeal stage no fresh evidence should be allowed unless it was not available at the trial. It is within this light that we have to view the application by the appellant.

(1) Paragraphs 4(a) And 4(b) – The Approvals By The Dewan Bandaraya Kuala Lumpur

The first two documents that the appellant seek to produce are the documents stated in paras. 4(a) and 4(b) of the prayers. The document in para. 4(a) is the approved layout plan dated 17 June 1997 while the document in para. 4(b) is the approval by the Dewan Bandaraya Kuala Lumpur in respect of the development plans.

The learned counsel for the appellant submitted that the issue in the present appeal is in respect of which plans were used by the appellant in their development of the site. The respondent contended that the plans used by the appellant were the one drawn by the respondent while the appellant contended the plans used were not drawn by the respondent but the one drawn by their new architect. The plans drawn by the new architect are the plans stated in paras. (4)(a) and (4)(b). The learned counsel for the appellant submitted that the production of those plans is necessary in order to show that there are differences between the plans drawn by the respondent and the one drawn by the new architect. As such the approved plans stated in paras. 4(a) and 4(b) are relevant for the purposes of this appeal.

The learned counsel for the appellant went on to submit that the layout plans were approved by the Dewan Bandaraya Kuala Lumpur on 17 June 1997 while the development plans were only approved on 8 December 1998 which were not disputed by the respondent. The learned counsel pointed out both the plans were not approved by the Dewan Bandaraya Kuala Lumpur at the commencement of the trial in the High Court. The layout plans were approved after the commencement of the trial but before the conclusion of the trial while

the development plans were approved after the trial had been concluded but before the learned judge made his decision. The learned counsel for the appellant submitted that the layout plans without the development plans would be of no use to show the differences between the plans drawn by the respondent and the one drawn by the appellant's new architect. The learned counsel went on to narrate the chronology of events in respect of the trial. He said on 6 April 1998 at the conclusion of the trial the parties were asked to put their written submissions. On that day the layout plans had been approved but not the development plans. The learned judge fixed 24. December 1998 to make his decision but on that date the judge requested the parties to make further submissions only in respect of quantum. It is to be noted that by then the development plans had been approved by the Dewan Bandaraya Kuala Lumpur.

The learned counsel for the appellant contended that when the development plans were approved on 8 December 1998, the trial proper had been concluded and what was left to be done was for the parties to submit their written submissions. In fact, when the main submissions were filed in court the development plans had not been approved yet. At that stage the parties were awaiting the decision of the learned judge which was to take place on 24 December 1998. Apparently, when the parties appeared in court for the decision, the learned judge instead asked the parties to make further submissions only in respect of quantum. The learned counsel for the appellant further submitted that following the events, the appellant had no opportunity to produce the development plans together with the layout plans. Both plans should be produced together. It is too late in the day to request for the reopening of the whole trial and to prepare the witnesses.

The appellant should be allowed to adduce those evidence at the appeal stage.

The learned counsel for the respondent did not dispute the events narrated by the appellant but contended that the trial was only concluded on 25 January 1999 after the parties submitted further submissions at the request of the learned judge and on that date the learned judge reserved judgment which he eventually delivered on 11 May 1999. Since both the layout plans and the building plans had been approved they were available during the trial or at least before the conclusion of the trial, ie, before the learned judge gave judgment. The learned counsel for the respondent contended further that the application by the appellant was an attempt to adduce fresh evidence which was available during the trial which they neglected or refused to tender during the trial. He added further that the production of those documents would not have any important influence on the result of the appeal.

The appellant conceded that their application tantamount to adducing fresh evidence at the appeal stage. They lost the opportunity of adducing the evidence during the tral because of the late approval by the Dewan Bandaraya Kuala Lumpur on the development plans.

As to the fact that whether the production of those documents have any important influence on the result, it is necessary for us to refer to the judgment of the learned trial judge (which is exhibited in the affidavit of the respondent). In [1999] 3 CLJ 388 at p. 389 of his judgment the learned judge stated:

> It is interesting to observe that after the plaintiff was discharged as the architect of the said Project, *the defendant contended that new amended layout plans and amended building plans were submitted. However, DW2 did not produce any of the alleged new amended layout plans and amended building plans or even a fresh JVA between the defendant. IGB and Dewan Bandaraya Kuala Lumpur. There was not even produced to the Court, a new development order*. I therefore find that as admitted by DW2, the defendant is still continuing with development of the said Project under the existing JVA. Even if the concept of the Project had been varied (which I find is not the case) the Project nevertheless remains the same and is still ongoing.
>
> *It is clear to me that the defendant has been labouring under an erroneous misconception that an alteration or variation of the concept of the development is synonymous with the Project being abandoned*. In any case DW2 had admitted that the plaintiff's services were terminated not because the Project was aborted, but because IGB wanted to use their own architects. He who asserts, proves. The defendant has in my judgment failed to discharge the burden of proving that the Project had been abandoned or aborted. (emphasis added).

The above passages clearly show that the learned judge was under the wrong perception that the new layout plans and development plans were non-existent and they were something being made up by the appellant. As we understand it, the basis of the respondent's claim in the present appeal was that the appellant used the respondent's plans to develop the site and the appellant had not abandoned the development of the site based on the plans drawn by the respondent. It is the case of the appellant that the development of the site based on the plans drawn by the respondent was abandoned and the development of the site are now under the new plans drawn by the appellant's new architect. It is really necessary for those plans to be produced in order for the court to determine whether the development of the site by the appellant was based on the new plans drawn by the appellant's new architect or based on the plans drawn by the respondent. It will be the appeals court to correct the perception made by the learned trial judge and for the court to determine whether the learned judge had arrived at the right conclusion. That is the crucial issue in the present appeal.

We take note that the new layout plans were approved on 17 June 1997 when the trial was in full swing while the approval of the development plans was given on 8 December 1998 after the parties completed giving evidence in court. It is obvious to us that the layout plans without the development plans are meaningless. Both plans formed one integral part of the whole project. It is common ground that by 6 April 1998 the deposition of witnesses and tendering of documentary evidence had been completed after which the learned judge requested the parties to file their written submissions. The parties filed their written submissions on 2 December 1998. From the affidavit it is clear to us that at that point of time the developments had not been approved yet. It was then indicated to the parties that the learned judge would deliver his judgment on 24 December 1998 but on that date the learned judge requested the parties to file further submissions on quantum only indicating he would not entertain any other evidence. Even though on that day the development plans had been approved it is apparent to us that it was too late in the day for the appellant to produce those documents which we believe are voluminous without reopening the whole trial.

We are of the view that the appellant had satisfied the requirements under s. 69(3) of the Courts of Judicature Act 1964 and r. 7(3) of the Rules of the Court of Appeal 1994. We hereby allow the application by the appellant in respect of the documents stated in paras. 4(a) and 4(b).

(2) Paragraph 4(c) – The Sales Brochure

In respect of this document, no evidence was led by the appellant to show that it was not available at the time when the trial took place. The appellant also failed to satisfy us the relevancy of this document for the purposes of this appeal. In our view, the sales brochure represent the pictorial views of the layout and building plans. Further, we are of the view that the pictorial views could be changed from time to time at the request of the purchasers. In our opinion the layout and building plans are sufficient for the purpose of the appeal to show whether the appellant had in fact used the respondent's plans or otherwise. For that we refused the application.

(3) Documents Stated In Paragraphs 4(d) And 4(e) – Notes Of Proceedings In OM No. R8-25-46-1989 And The Order Of The Supreme Court Civil Appeal No. 02-124-1990 Dated 13 November 1990

The appellant claimed that the notes of proceedings in the High Court in OM No. R8-25-46-1989 and the order of the Supreme Court Civil Appeal No. 02-124-1990 dated 13 November 1990 are relevant for the purposes of this appeal. From the record, it is clear to us that the Supreme Court Order was the decision of that court in respect of an appeal from the decision of OM No. R8-25-46-1989. As such they form the integral part of the proceedings in OM No. R8-25-46-1989.

The learned counsel for the appellant conceded that the Supreme Court order and the proceedings in the High Court were available during the trial but due to the ignorance and the inadvertence of the former counsel who appeared for the appellant those documents were not produced at the trial. The learned counsel added that the appellant's former solicitors were not served with a copy of the order of the Supreme Court and the proceedings in the High Court had been misplaced. The former counsel for the appellant did not appreciate the relevancy of the decision of the Supreme Court. The learned counsel for the appellant further submitted that the respondent would not be caught by surprise with this application because the documents were in their possession during the trial. The respondent could have produced them at the trial but they chose not to do so. In the pleadings those documents were referred to.

The learned counsel for the appellant contended that those documents are necessary and relevant for the purposes of the present appeal to determine the date of termination of the respondent's contract. It was the ruling of the Supreme Court that the appellant could terminate their contract with the respondent.

The ruling made it clear that with the termination by the appellant, the respondent would not be allowed to continue the performance of that contract. The ruling also made it clear that the appellant were at liberty to hire new architects and contractors to develop the site. Those documents are important for the purposes of determining the date of the termination and to what extent the respondent were entitled to damages in respect of works done.

We made it clear to the learned counsel for the appellant that though the documents were in the possession of the respondent, they were not duty bound to produce them at the trial especially when it was not in their interest to do so.

The learned counsel for the respondent conceded that OM proceedings and the Supreme Court decision were pleaded by the appellant in their statement of defence but no evidence was adduced at the trial. As such that part of the pleading was deemed to have been abandoned. Further, the decision of the Supreme Court dealt only with the issue of the letter of release from the respondent to the appellant's new architects. As such those documents are not relevant to determine the issue in the present appeal.

The learned counsel for the respondent was right when he said that since the appellant did not adduce any evidence during the trial in respect of those documents, the appellant could not refer to them if nothing is mentioned in the judgment of the learned judge. But then, the learned judge in his judgment referred to the OM proceedings in the High Court and the Supreme Court's decision when he stated at pp. 388:

> The defendant pleaded that its right to terminate the services/contract of the plaintiff was implied by law. It also argued that from the letter of appointment dated 6.4.84 it was implied that the plaintiff's services may be terminated if the project was aborted, abandoned or delayed. The defendant denied that the plaintiff's termination was wrongful or unlawful and the defendant further denied that it was in breach of the said contract. It also pointed out that from a decision of the then Supreme Court in Civil Appeal No. 02-124-1990 it was implied that the plaintiff's services were terminable and that the termination thereof was correctly made and that the issue of the said termination was *res judicata.* ...

The above statement by the learned judge re-opened the issue of the termination of the respondent's contract by the appellant. The learned judge raised the issue of the validity of the termination of the respondent's contract by the appellant. In our view, the appellant now has the right to show to the court that the Supreme Court had determined that issue. From the above statement, we are of the view that it was the respondent who reopened the issue of the appellant's right to terminate the respondent's contract. In the interest of justice those documents should be allowed to be produced at the hearing of the appeal for the court to decide whether the respondent's contract was correctly terminated by the appellant.

The application by the appellant in respect of this is hereby allowed.

(4) The Agreement Between The Appellant And IJM Corporation Bhd (No. 104131-A) and IT & T Engineering & Construction Sdn Bhd (No. 86508-H)
The last sets of documents that the appellant applied to produce at the hearing of this appeal are the agreements between the appellant and IJM Corporation Bhd (No. 104131-A) and IT & T Engineering & Construction Sdn Bhd. The reason as stated by the learned counsel for the appellant was that these documents would show the new designs by the two contractors and that the progress of the construction at the site was totally different from the one designed and constructed by the respondent. The learned counsel stated further that the appellant issued the letter of award and the new contractors moved to the site on 3 July 1996. It was also submitted at that point of time the terms and conditions were still under discussion.

The learned counsel for the respondent objected to the production of these documents. It is clear to us that the learned counsel was right in objecting to the production of these documents since these documents were available during the trial and no reason was given why it could not be tendered as evidence at the trial. Secondly, the respondent are not parties to the contract and that both IJM Corporation Bhd and IT & T Engineering & Construction Sdn Bhd are not parties in the appeal proceedings.

We uphold the objection by the respondent and the application to produce these documents is hereby refused.

Application To Amend The Memorandum Of Appeal

By a separate application, the appellant sought to amend that memorandum of appeal already filed. The learned counsel for the appellant submitted that the proposed amendments were necessary in view of the application by the appellant to produce those documents. The proposed amendments are to reflect the documents and the evidence already allowed by us to be produced at the hearing of the appeal.

It is obvious to us that the respondent are objecting to the proposed amendments.

(1) Amendment To Paragraph 1

The learned counsel for the respondent pointed out that the point raised in the proposed amendment was initially objected to by the appellant in the High Court but that objection was overruled by the court below. As such it would not be proper for the appellant to raise it at the appeal stage. The learned counsel for the appellant submitted that the issue raised in the proposed amendment is a point of law which could be taken at any stage of the proceedings including at the appeal stage. The reason why this was put as a proposed amendment is because the respondent would not be caught by surprise. We hereby allowed the proposed amendment.

(2) Amendment To Paragraph 2

The learned counsel for the appellant submitted that this proposed amendment is necessary in view of our decision to allow the application by the appellant to produce the proceedings in the High Court and the order of the Supreme Court in respect of OM No. R8-25-46-1989. The only objection by the respondent was that no evidence was led in the High Court. As we have stated earlier the appellant conceded that they did not lead evidence in respect of this in the High Court. To correct the perception of the learned judge that the termination of the respondent's contract by the appellant was invalid for null and void it is necessary to refer to the decision of the Supreme Court. We have allowed the application by the appellant to produce those documents at the hearing of the appeal. The proposed amendment is consequential to that. We allowed the proposed amendment.

(3) Amendments To Paragraphs 3, 12 and 13

The learned counsel for the appellant submitted that these amendments are consequential of their application to introduce new evidence during the appeal. Since that application had been allowed the proposed amendments are necessary. The learned counsel for the respondent objected on the ground that the issue of delay was never raised in the pleading or at the trial and as such it is too late in the day to raise the issue. It is to be noted that the objection by the learned counsel for the respondent was done without even considering what had transpired when we considered the application by the appellant to produce fresh evidence at the hearing of the appeal. The basic rule as we see it that an appellant has the right to amend their memorandum at any stage before the hearing commenced. In this case the appellant were justified in amending the memorandum which in our view are consequential of our decision in allowing the appellant's application to produce fresh evidence at the hearing of this appeal. In the interest of justice we allowed the amendments proposed by the appellant.

Our decision in respect of those applications are:

(1) The appellant be at liberty to file and serve a supplementary record of appeal containing a certified copy of the sealed order of the High Court of Malaya at Kuala Lumpur dated 11 May 1999 within two weeks from the day we gave our decision in court.

(2) The appellant be allowed at the hearing of this appeal to introduce the following fresh evidence:

(i) a copy of the approved layout plan dated 17 June 1997;

(ii) the approval letter dated 8 December 1998 from the Dewan Bandaraya Kuala Lumpur approving the development plans;

(iii) the notes of proceedings in the High Court of Malaya at Kuala Lumpur in respect of the Originating Motion No. R8-25-46-1989;

(iv) the order of the Supreme Court dated 13 November 1990 in respect of the Supreme Court Civil Appeal No. 02-124-1990; and

(v) the PAM contract referred to in the OM proceedings above.

The appellant are to file and serve all the above-stated documents as supplementary record of appeal within four (4) weeks.

(3) The application by the appellant to introduce and admit the following documents as fresh evidence is hereby refused:

(i) the copy of a sales brochure containing a pictorial representation of the proposed development; and

(ii) the agreement between the appellant and IJM Corporation Bhd (No. 104131-A) and IT & T Engineering and Construction Sdn Bhd (No. 86508-H) together with attachment three (3) thereof;

(4) The amendments as stated in the proposed amendments in exh. "TBG1" are hereby allowed. The amended memorandum of appeal is to be filed and served within four weeks.

(5) Costs in the cause.